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5 **UNITED STATES OF AMERICA**
6 **BEFORE THE NATIONAL LABOR RELATIONS BOARD**

7 **Seattle University,**

8 **Employer,**

9 **and**

10 **Service Employees International Union,**
11 **Local 925,**

12 **Petitioner.**

Case 19-RC-122863

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15 **SEATTLE UNIVERSITY'S REQUEST FOR REVIEW OF THE REGIONAL**
16 **DIRECTOR'S SUPPLEMENTAL DECISION AND ORDER**

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INTRODUCTION

Seattle University requests review of the Regional Director's Supplemental Decision and Order ("Order") in *Seattle University and Service Employees International Union, Local 925*, Case 19-RC-122863, issued March 3, 2015. The University requests review under Section 102.67(b) and (c) of the National Labor Relations Board's ("the Board's") Rules and Regulations.

As an initial matter, the University does not contest the natural right of workers to organize and to bargain collectively, and the moral duty of employers to bargain.¹ The Roman Catholic Church "recognizes the fundamental role played by labor unions, whose existence is connected with the right to form associations or unions to defend the vital interests of workers employed in the various professions." Pontifical Council for Justice and Peace, *Compendium of the Social Doctrine of the Church*, VI(a) §305 (2004). The University supports the Church's teaching in this regard. Government control over labor matters, however, is a different matter because it jeopardizes Church autonomy and the autonomy of religiously-affiliated colleges and universities in how they carry out their religious missions. The issue is not whether faculty may organize. Rather, the issue is whether the government can and should exercise control or influence over how a religiously-affiliated university carries out its religious mission.

The University requests review of the Regional Director's finding that the Board has jurisdiction over the University under the Board's recent decision in *Pacific Lutheran University*, 361 NLRB No. 157 (2014).² In *Pacific Lutheran University*, the Board jettisoned its former "substantial religious character" test for determining Board jurisdiction over religiously-affiliated

¹ Laycock, *Towards a General Theory of the Religion Clauses: The Case of Church Labor Relations and the Right to Church Autonomy*, 81 Colum. L. Rev. 1373, 1398 (1981) (footnote omitted).

1 colleges and universities (which was the basis for the Regional Director’s Decision and Direction
2 of Election in the instant case) in favor of a two-part test that purports to balance constitutional
3 concerns deriving from the Free Exercise and Establishment Clauses of the First Amendment of
4 the Constitution (“the Religion Clauses”) against employees’ section 7 rights under the National
5 Labor Relations Act (“the Act”). The new test under *Pacific Lutheran University* contravenes
6 the United States Supreme Court’s holding in *National Labor Relations Board v. Catholic*
7 *Bishop of Chicago* (“*Catholic Bishop*”), which held that Congress did not intend to bring
8 teachers at church-operated schools within the jurisdiction of the Act.³ In addition, the new test
9 contains the same constitutional infirmities as existed in the Board’s former “substantial religious
10 character” test, which caused the D.C. Circuit Court of Appeals to require a simple, “bright line”
11 test to determine Board jurisdiction over religiously-affiliated colleges and universities. *Carroll*
12 *College v. NLRB*, 558 F.3d 568 (D.C. Cir. 2009); *Univ. of Great Falls v. NLRB*, 278 F.3d 1335
13 (D.C. Cir. 2002). Furthermore, the Regional Director misapplied the *Pacific Lutheran*
14 *University* test and in doing so also disregarded facts in evidence that would have compelled him
15 to conclude that the Board did not have jurisdiction over the University. Finally, the Regional
16 Director should have reopened the record to take additional evidence to address the new test put
17 forth by the Board. His failure to reopen the record deprived the parties of the opportunity to put
18 forward evidence addressing specifically the new test, was an abuse of discretion, and deprived
19 the University of procedural due process.

20 The University believes these are compelling reasons for the Board to grant review of the
21 Order, and for reconsideration of the Board’s *Pacific Lutheran University* test. The Board lacks

22 ² The University does not request review of the portions of the Order addressing the managerial status of non-tenure
23 track faculty, community of interest or the exclusion of the College of Nursing and School of Law from the
proposed bargaining unit.

24 ³ 440 U.S. 490 (1979).

jurisdiction in this case because the University clearly meets the “bright line” test set forth by the D. C. Circuit in *University of Great Falls* and *Carroll College*.

ARGUMENT

I. PACIFIC LUTHERAN UNIVERSITY AND THE REGIONAL DIRECTOR’S ORDER

A. Pacific Lutheran University

In *Pacific Lutheran University*, the Board reexamined the standard it applied for determining when it should decline to exercise jurisdiction over faculty members at self-identified religious educational institutions in accordance with *Catholic Bishop*. 361 NLRB No. 157, 1. It discarded the “substantial religious character” test it had developed in the 36 years since the Supreme Court decided *Catholic Bishop*. Under that test, the Board decided on a case-by-case basis whether a religious-affiliated school had a “substantial religious character” to fall outside of Board jurisdiction. The Board scrutinized “all aspects of a religious school’s organization and function that may be relevant to ‘the inquiry whether the exercise of the Board’s jurisdiction presents a significant risk that the First Amendment will be infringed.’” *Trustees of St. Joseph Coll.*, 282 NLRB 65, 68 n. 10 (1986). This inquiry included the extent to which the affiliated religious group was involved in the daily operation of the school, the degree to which the school had a religious mission and curriculum, and whether the school used religious criteria in appointing or evaluating faculty. *Id.* After reviewing decisions by the D. C. Circuit in *University of Great Falls* and *Carroll College*, as well as by the First Circuit in *Universidad Central de Bayamon v. NLRB*, 793 F.2d 383 (1st Cir. 1986) (*en banc*), *denying enf. to* 273 NLRB 1110 (1984), and after inviting and reviewing briefs filed by interested parties, the Board put forth a new test in *Pacific Lutheran University* that “is faithful to the holding of

1 *Catholic Bishop*, sensitive to the concerns raised by the parties and amici, and consistent with
2 our statutory duty. 361 NLRB No. 157, at 5.

3 Under its new test, the Board will not decline to exercise jurisdiction over faculty
4 members at a college or university that claims to be a religious institution unless the college or
5 university first demonstrates, as a threshold matter, that it holds itself out as providing a religious
6 educational environment. This threshold test adopts the first two parts of the D. C. Circuit’s
7 “bright line” test under *University of Great Falls* and *Carroll College*, under which the Board
8 lacks jurisdiction if the institution (1) holds itself out to students, faculty, and community as
9 providing a religious educational environment; (2) is organized as a nonprofit; and (3) is
10 affiliated with, or owned, operated, or controlled, directly or indirectly, by a recognized religious
11 organization, or with an entity, membership of which is determined, at least in part, with
12 reference to religion. *Univ. of Great Falls*, 278 F.3d at 1343 (citations omitted).⁴ Once that
13 threshold is met, the college or university must then show that it holds out the petitioned-for
14 faculty members as performing “a religious function.” 361 NLRB No. 157, at 1. “This requires
15 a showing...that it holds out those faculty as performing a specific role in creating or
16 maintaining the university’s religious educational environment.” *Id.* In applying its test to
17 Pacific Lutheran University, the Board concluded that, though the university met the threshold
18 showing that it held itself out as providing a religious educational environment, the university
19 failed to demonstrate that it held out its faculty as performing a “specific role in creating or
20 maintaining the university’s religious educational environment.” *Id.* at 5.

21 The Board’s avowed intention in fashioning this test was to ensure that the assertion of
22 the Board’s jurisdiction, and the test the Board uses, do not violate the Religion Clauses of the

23 _____
24 ⁴ The Board’s threshold test does not include the third element of the D.C. Circuit’s “bright line” test.

1 First Amendment of the Constitution. *Id.* at 3. It cited *Catholic Bishop*’s admonition that “[i]t is
2 not only the conclusions that may be reached by the Board which may impinge on rights
3 guaranteed by the Religion Clauses, but also the very process of inquiry leading to findings and
4 conclusions.” *Id.* at 3, citing 440 U.S. at 502. “First, our test must not impinge on a university’s
5 religious rights and must avoid the type of intrusive inquiry forbidden by *Catholic Bishop*.
6 Second, our decision on whether to assert jurisdiction over faculty members must give due
7 consideration to employees’ section 7 rights to decide whether to engage in collective
8 bargaining.” 361 NLRB No. 157, at 5. The Board determined that the *University of Great Falls*
9 test “overreaches because it focuses solely on the nature of the institution, without considering
10 whether the petitioned-for faculty members act in support of the school’s religious mission.” *Id.*
11 at 6. It rejected the union’s and amici’s arguments that the Board should scrutinize whether
12 faculty members actually perform a religious function, lest this result in “the type of intrusive
13 inquiry into a university’s religious beliefs and practices which was rejected by the Supreme
14 Court in *Catholic Bishop*.” *Id.* The focus of the inquiry is whether there is a “significant risk” of
15 infringement under *Catholic Bishop*, which requires an examination of the specific employees in
16 the petitioned-for unit. *Id.* The Board cited, incompletely, *Catholic Bishop* when the Board
17 wrote that “if teachers play a ‘critical and unique role’ in creating and sustaining a religious
18 educational environment, the Board’s assertion of jurisdiction over them could result in
19 interference in management prerogatives and ‘open the door to conflicts between clergy-
20 administrators and the Board.” *Id.* at 8, *quoting in part* 440 U.S. at 503 (“Inevitably, the Board’s
21 inquiry will implicate sensitive issues that open the door to conflicts between clergy-
22 administrators and the Board, *or conflicts with negotiators for unions.*”) (emphasis added). If
23 teachers do not play a role in effectuating the university’s religious mission and are not under
24

1 religious control or discipline then there are no concerns about excessive entanglement under the
2 First Amendment. *Id.* at 8.

3 The Board did not want to examine actual faculty functions, because to do so could raise
4 First Amendment concerns. *Id.* Consequently, and to “avoid ‘trolling’ through a university’s
5 operation to determine whether and how it is fulfilling its religious mission,” the Board set out its
6 “holding out” principle: It will decline jurisdiction if the university “holds out” its faculty
7 members, in communications to current or potential students and faculty members, and the
8 community at large, as performing a specific role in creating or maintaining the university’s
9 religious purpose or mission.” *Id.* The Board “will not examine faculty members’ actual
10 performance of their duties.” *Id.* It “eliminates the need for a university to explain its beliefs,
11 avoids asking how effective the university is at inculcating its beliefs, and does not ‘coerce[] an
12 educational institution into altering its religious mission to meet regulatory demands.’” *Id.*,
13 *citing Univ. of Great Falls*, *supra* at 1344-1345 (addressing universities that hold themselves out
14 as religious or religiously-affiliated).⁵ Evidence that faculty members are required to conform to
15 its religious doctrine, tenets or beliefs, are subject to dismissal for teaching a doctrine that is at
16 odds with the religious tenets of the institution or are expected to comply with (or not openly
17 contravene) religious tenets, are required to serve a religious function such as integrating the
18 institution’s religious teachings into coursework, serving as religious advisors, propagating
19 religious tenets, or engaging in religious indoctrination or religious training, will cause the Board
20 to decline jurisdiction. *Id.* at 8, 10 n.19. A commitment to diversity and academic freedom
21 means that religion has no bearing on faculty members’ job duties or responsibilities. *Id.* at 8.

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23 ⁵ The Board will look at job descriptions, employment contracts, faculty handbooks, statements of accrediting
24 bodies, and statements to prospective and current faculty and students, though the Board “will not seek to look
behind these documents to determine what specific role petitioned-for faculty actually play in fulfilling the religious
mission of a school or to inspect the university’s actual practice with respect to faculty members.” *Id.* at 9.

1 To the Board, this test means the inquiry “will not entangle the Board, or reviewing courts, into
2 the university’s religious beliefs and practices.” *Id.* at 10. Faculty who are not held out as
3 performing such specific roles are “indistinguishable” from faculty at secular colleges and
4 universities because both faculty “perform nonreligious instruction and are hired, fired, and
5 assessed under criteria that do not implicate religious considerations.” *Id.* at 8.

6 **B. The Board Order, the Regional Director’s Order on Remand, and the**
7 **University’s Position Statement in Response to the Order on Remand.**

8 On February 3, 2015 the Board issued an Order (“*Board Order*”) remanding the
9 proceedings in the instant case “to the Regional Director for further appropriate action consistent
10 with *Pacific Lutheran University*, including reopening the record, if necessary.” *Board Order*,
11 February 3, 2015. On February 6, 2015, the Regional Director directed the parties to submit
12 their positions on whether the Regional Director should reopen the record or whether the current
13 record was adequate to address the new standard. *Order on Remand*, February 6, 2015. The
14 University submitted a position statement (“*Position Statement*”) in which it requested a
15 reopening of the record to address the new standard, to provide evidence addressing the “specific
16 religious function” of University faculty within the context of the University’s Catholic and
17 Jesuit mission, and to ensure due process for the parties. *Position Statement*, February 17, 2015.
18 On March 3, 2015, the Regional Director issued his Order denying the University’s request to
19 reopen the record. His Order asserted Board jurisdiction over the University.⁶

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23 ⁶ The Regional Director also found the adjunct faculty were not “managers” under the new *Pacific Lutheran*
24 *University* standard addressing the Supreme Court’s *Yeshiva* factors. He did not address (thereby reaffirming) his
earlier decision dismissing the University’s community of interest objections to the proposed bargaining unit.

1 **C. The Regional Director’s Order**

2 The Regional Director came to the unavoidable conclusion that the University “holds
3 itself out as providing a religious educational environment.” *Order*, at 9. “Therefore, the
4 University meets the first step of the Pacific Lutheran University standard.” *Id.*

5 In addressing the second prong of the *Pacific Lutheran University* test, the Regional
6 Director found that the University does not hold out its faculty as performing a religious
7 function. *Id.* Consequently, the Regional Director concluded that the University failed the new
8 standard, and that the Board had jurisdiction in this case. In so holding the Regional Director
9 relied on the following evidence:

- 10 • Generalized statements in the University’s faculty handbook that faculty members
11 are “expected to show respect for the religious dimension of human life.” *Id.*;
- 12 • There is no evidence that faculty members are required to serve as religious
13 advisors to students, propagate tenets of the Society of Jesus, engage in religious
14 training, or conform to the tenets of Catholicism in the course of their job duties.
15 *Id.* at 10;
- 16 • There is no evidence that job postings included any statements that faculty
17 members must integrate the Catholic Church’s or Society of Jesus’s tenets into
18 coursework, serve as religious advisors, propagate the tenets of the Society of
19 Jesus, engage in religious training, or conform to the tenets of Catholicism in the
20 course of their duties. “[A] reasonable candidate...would not conclude that
21 performance of their faculty responsibilities would require furtherance of a
22 religious mission.” *Id.*

23 **II. THE NATIONAL LABOR RELATIONS ACT EXCLUDES RELIGIOUSLY-
24 AFFILIATED COLLEGES AND UNIVERSITIES UNDER *CATHOLIC BISHOP***

25 In *Catholic Bishop*, the Supreme Court held that Congress did not intend to bring
26 teachers at church-operated schools within the jurisdiction of the Act. 440 U.S. at 507. “Our
27 examination of the statute and its legislative history indicates that Congress simply gave no
28 consideration to church-operated schools.” *Id.* at 504-505 (citations omitted). The Court also
29 held that the Act excludes church-operated schools because exercising jurisdiction would result

1 in excessive entanglement in violation of the First Amendment Religion Clauses. *Id.* at 507.

2 The Court saw inevitable entanglement when the Board exercised its statutory role to enforce the
3 Act in matters involving religious schools:

4 The resolution of [unfair labor practice] charges by the Board, in many instances, will
5 necessarily involve inquiry into the good faith of the position asserted by the clergy-
6 administrators and its relationship to the school's religious mission. It is not only the
7 conclusions that may be reached by the Board which may impinge on rights guaranteed
8 by the Religion Clauses, but also the very process of inquiry leading to findings and
9 conclusions.

10 The Board's exercise of jurisdiction will have at least one other impact on church-
11 operated schools. The Board will be called upon to decide what are "terms and
12 conditions of employment" and therefore mandatory subjects of bargaining...Inevitably
13 the Board's inquiry will implicate sensitive issues that open the door to conflicts between
14 clergy-administrators and the Board, or conflicts with negotiators for unions.

15 *Id.* at 502-503 (citations omitted).

16 It makes no difference that the teachers at issue teach "secular" subjects. "Religious
17 authority necessarily pervades the school system." *Id.* at 501, *quoting Lemon v. Kurtzman*, 403
18 U.S. 602, 617 (1971). The Court also noted that, regardless of whether the teacher was teaching
19 a religious or secular subject, "a teacher remains a teacher, and the danger that religious doctrine
20 will become intertwined with secular instruction persists." *Id.* (citations omitted). The Board,
21 too, extended this principle to non-teachers at religious institutions. The Board has held that it
22 will not exercise jurisdiction over employees performing "secular" tasks such as custodial or
23 maintenance work for a church employer. *St. Edmund's High School*, 337 NLRB 1260, 1261
24 (2002) (declining jurisdiction over unit of custodial employees employed at a parochial high
school; prior cases, including *Hanna Boys Center*, 284 NLRB 1080 (1987), distinguished
because they did not involve an employer "which was itself a religious institution pursuing a
religious mission." *Id.* at 1260-61; *Riverside Church*, 309 NLRB 806, 801 (1992) (declining
jurisdiction over service and maintenance unit employed by a church and who performed

1 “secular tasks without which the Employer would be unable to accomplish its religious
2 mission.”). “The substantial religious character of these church-related schools give rise to
3 entangling church-state relationships of the kind the Religion Clauses sought to avoid.” *Catholic*
4 *Bishop, supra* at 503, *quoting Lemon*, 402 U.S. at 616 (internal citations omitted). If a school’s
5 mission is a religious one, all school activities ultimately serve a religious purpose. The *Catholic*
6 *Bishop* court found that teachers of both religious and secular subjects, regardless of their
7 personal faith and religious activities, were exempt from the Act’s jurisdiction.⁷

8 The D.C. Circuit addressed *Catholic Bishop* by creating a jurisdictional test that avoids
9 the constitutional infirmities inherent with the Board’s former “substantial religious character
10 test.” Under the “substantial religious character” test, the Board collected evidence and asked if
11 the institution was “sufficiently religious.” The D.C. Circuit found this too intrusive because it
12 required the Board to “troll” through the school’s religious beliefs, assessing the nature of the
13 beliefs and its religious mission. *Carroll College, supra* at 572; *Univ. of Great Falls, supra* at
14 1343. The three part “bright line” test adopted by the D.C. Circuit avoids these problems
15 because it “allow[s] the Board to determine whether it has jurisdiction without delving into
16 matters of religious doctrine or motive, and without coercing an educational institution into
17 altering its religious mission to meet regulatory demands.” *Univ. of Great Falls*, 278 F.3d at
18 1345.

20 ⁷ Then-Judge Breyer, in *Bayamon*, dismissed the Board’s position that it and the courts would address constitutional
issues as they arose in a collective bargaining relationship involving a religiously-affiliated university:

21 Under this rationale...we cannot avoid entanglement by creating new, finely spun judicial distinctions that
22 will themselves require further court or Labor Board ‘entanglement’ as they are administered. To order the
23 Board to exclude priests from the bargaining unit; to approve its having separated the seminary from the
rest of the school; to create special burden of proof rules; to promise that courts in the future will control
the Board’s efforts to examine religious matters, is to tread the path that *Catholic Bishop* forecloses. These
ad hoc efforts, the application of which will themselves involve significant entanglement, are precisely
what the Supreme Court in *Catholic Bishop* sought to avoid.

24 793 F.2d 383, 402 (1986) (*en banc*).

1 The *Pacific Lutheran University* test, and the Regional Director’s *Order*, perpetuate the
2 constitutional problems identified in *Catholic Bishop* and by the D.C. Circuit. Instead of asking
3 if the college or university is “sufficiently religious,” the Board now asks if the role of the faculty
4 member is “sufficiently religious.” Both questions require the Board to make a determination of
5 what is “religious.” In addition, under *Pacific Lutheran University*, the Board will now have to
6 decide what constitutes a “specific function” that is religious. The Board will have to troll
7 through the same facts and issues as it did under its former case law. It will need to determine
8 what the university’s religious mission is, the role of the faculty in carrying out that religious
9 mission, and whether faculty are held out as serving such a role.⁸ Otherwise, the Board will be
10 unable to make determinations of “specific” “religious” functions.

11 As with the “substantial religious character” test, the Board’s new test also fails to
12 address the unavoidable entanglement problems that will arise when the Board is asked to
13 enforce the Act against a religious university in the collective bargaining arena. *Catholic Bishop*
14 and subsequent appellate cases foresaw the inevitable entanglement issues related to the Board’s
15 role in enforcing the Act against a religious college or university through the Board’s unfair
16 labor practice procedures. It is not hard to see that the reality of collective bargaining and the
17 unfair labor practice charge mechanism for enforcing the Act will lead to constitutional
18 problems. For example, Board jurisdiction over a religiously-affiliated university will:

- 19 • Grant to faculty members a section 7 right to strike in an attempt to prevent or
20 hinder the university from carrying out its religious mission of providing
21 education to students;

22 ⁸ Under the new approach, if the faculty members perform a religious function, but are not held out as such, the
23 Board will still assert jurisdiction. Conversely, if the faculty members perform no religious function, but the
24 university holds them out as performing a religious function, the Board will not assert jurisdiction. This is an absurd
result, making it more likely the Board will assert jurisdiction in both cases, rendering the “holding out” requirement
meaningless.

- 1 • Require a university to negotiate over “mandatory subjects of bargaining”—
2 wages, benefits and other terms and conditions of employment—including union
3 proposals to provide insurance coverage covering contraception, abortion or other
reproductive services, and will make it unlawful to refuse to bargain over such
proposals, subjecting the university to sanctions by the Board;
- 4 • Require the university to bargain over contract provisions including seniority, job
5 qualifications, promotions, job assignments and disciplinary criteria, that may be
6 contrary or detrimental to the university’s religious mission, and will make it an
unfair labor practice to refuse to bargain over the same;
- 7 • Require the university to disclose information to a union the Board deems
8 relevant to a union bargaining proposal or grievance, or to the Board in an unfair
9 labor practice proceeding, which can include any information, communications or
documents substantiating the university’s position that an employment decision or
bargaining position is contrary to its religious mission;
- 10 • Prevent a university from insisting on a union waiver of the union’s right to
11 bargain over a mandatory subject of bargaining that the university believes would
infringe on its religious mission.

12 These problems are a few examples of why *Catholic Bishop* concluded that “[i]nvariably
13 the Board’s inquiry will implicate sensitive issues that open the door to conflicts between clergy-
14 administrators and the Board, or conflicts with negotiators for unions.” 440 U.S. at 502-503;
15 accord *Bayamon, Id.* at 402 (Religiously-affiliated universities pose same risk that Board will
16 violate the Religion Clauses as do secondary schools; “[u]nfair labor practice charges would
17 seem as likely; the Board’s likely scrutiny would seem at least as intense; the necessary
18 distinctions between religious and labor matters would seem no easier to make; and whether one
19 could readily “fence off” subjects of mandatory bargaining with a religious content would seem
20 similarly in doubt”). It is not just the Board engaging in unconstitutional “trolling” to determine
21 what a “religious” function is that violates the Religion Clauses. It is also the inevitable risk of
22 the Board investigating and issuing unfair labor practice rulings contravening the Religion
23 Clauses that have caused every reviewing court to conclude that the Board cannot assert
24 jurisdiction over a religious and religiously-affiliated school.

1 **III. THE REGIONAL DIRECTOR’S ORDER CONTAINS JUST THE SORT OF**
2 **INQUIRY THE BOARD STATES WILL NOT HAPPEN UNDER *PACIFIC***
3 ***LUTHERAN UNIVERSITY***

4 The Board maintains in *Pacific Lutheran University* that “examination of the actual
5 functions performed by employees could raise the same First Amendment concerns as an
6 examination of the university’s actual beliefs, and we are again faced with the need to avoid
7 ‘trolling’ through a university’s operation to determine whether and how it is fulfilling its
8 religious mission.” *Pacific Lutheran University, supra* at 8. “Although we will not examine
9 faculty members’ actual performance of their duties, we shall require that they be held out as
10 performing a *specific religious* function.” *Id.* (emphasis in original). “We will not seek to look
11 behind these documents to determine what specific role petitioned-for faculty actually play in
12 fulfilling the religious mission of a school or to inspect the university’s actual practice with
13 respect to faculty members.” *Id.* at 9. Despite these pronouncements, the Regional Director did
14 look behind the documents to come to the erroneous conclusion that the faculty at issue are not
15 held out as serving a religious function under the University’s religious mission.

16 The Regional Director found that there “is no evidence in the record that faculty members
17 are required to serve as religious advisors to students, propagate the tenets of the Society of
18 Jesus, engage in religious training, or conform to the tenets of Catholicism in the course of their
19 job duties.” *Order*, at 10. He refers to evidence by three of the petitioner’s witnesses that they
20 were never informed at the time of hire that they must adhere to, or propagate, Catholic doctrine.
21 *Id.* Furthermore, he found no evidence that faculty members must hold a particular view of
22 Catholic and Jesuit tenets when teaching the required course in Catholicism. *Id.* By seeking
23 such evidence, the Regional Director is guilty of the type of scrutiny the Board states it wants to
24 avoid.

1 To the Board, the appropriate test should not “limit the Catholic Bishop exemption to
2 religious institutions with hard-nosed proselytizing.” *Id.*, quoting *Univ. of Great Falls*, *supra* at
3 1346. The Regional Director, by seeking evidence of “hard-nosed” proselytizing, commits the
4 same error as the Board committed under the “substantial religious character” line of cases, and
5 which the Board expresses a desire to avoid under *Pacific Lutheran University*. The D.C. Circuit
6 found such an emphasis untenable:

7 If the University is ecumenical and open-minded, that does not make it any less religious,
8 nor NLRB interference any less a potential infringement of religious liberty. To limit the
9 *Catholic Bishop* exemption to religious institutions with hard-nosed proselytizing, that
10 limit their enrollment to members of their religion, and have no academic freedom...is an
unnecessarily stunted view of the law, and perhaps even itself a violation of the
Establishment Clause—not to prefer some religions (and thereby some approaches to
indoctrinating religion) to others.

11 *Univ. of Great Falls*, *supra* at 1346.

12 The court continued: “That a secular university might share some goals and practices
13 with a Catholic or other religious institution cannot render the actions of the latter any less
14 religious.” *Id.*

15 **IV. THE REGIONAL DIRECTOR DISREGARDED FACTS SHOWING THAT**
16 **PETITIONED-FOR FACULTY SERVE A SPECIFIC ROLE IN PROMOTING**
THE UNIVERSITY’S RELIGIOUS MISSION OF HIGHER EDUCATION

17 In addition to the evidence noted above, the Regional Director dismissed “generalized
18 statements” from the Faculty Handbook to find that the University’s faculty did not have a
19 “specific religious function.” Taken collectively, the evidence shows just the opposite:
20 University faculty play an instrumental role in promoting the Catholic and Jesuit mission of
21 higher education, and employing Jesuit values in carrying out that mission. Without its faculty,
22 the University would not exist and the Jesuit mission would go unfulfilled.

1 Evidence in the record, and which the Regional Director overlooked or discounted, shows
2 the religious mission of the Society of Jesus, the spiritual dimension of the mission through
3 Jesuit charism, and the religious dimension of the faculty's role as teachers in carrying out the
4 Catholic and Jesuit mission: "The principal apostolate of the Jesuit religious community at the
5 University, including Father Stephen Sundborg, the University's President, is the work of
6 Catholic higher education." *ER Ex. 2, Article VI*.

7 The Jesuit religious mission in education is to educate and to form the whole person so
8 that he or she will be of-service, particularly for justice within the world. Jesuits believe the
9 whole person has a transcendental or religious dimension or spirituality. The University seeks to
10 acknowledge respect and foster the awareness of that within its students and to educate the whole
11 person. The Jesuit educational mission focuses on the religious or the spiritual dimension of what
12 the person is. *Tr. 53: 1-23*.

13 The educational mission stresses philosophy, theology, deep thought and analytics. It
14 promotes a student learning how to stand on his or her own moral principles and to know how to
15 defend them and then how to apply them in service within society. *Tr. 54:15-18*.

16 The mission of the University as an educational institution comes through the faculty.
17 What faculty deliver and how they deliver has to be in accord with the University's mission. *Tr.*
18 *129:5-9*.

19 Jesuits believe that all individuals have a vocation, including those in the professions.
20 This is a religious call from God. A "vocation" adds a religious dimension to the secular
21 concepts of "profession" or "career." *Tr. 256:2-18*. Similarly, to the Jesuits, education by its
22 nature is not strictly secular. According to Father Sundborg:

23 [T]he Jesuit education does not like the distinction between sacred and secular because
24 we believe we can find the sacred within the secular. So we don't tend to talk about

1 secular society and then religious society, but rather what we're about is engagement with
2 culture and that within that culture there are various kinds of sacred dimensions. And so
3 when you talk about a secular purpose, yes, we're training lawyers and we're training
4 business people and we're educating people who will work in criminal justice systems
5 and so forth, and their careers will be, sort of on [face] value, secular careers. But we
6 believe the kind of education that we offer of the whole person and with the -- the respect
7 for the transcendental or religious dimension of the person, that they will carry that out in
8 a -- in a different kind of way than is simply secular, if you mean by secular sort of the
9 exclusion of God from that realm. So we do have a secular purpose and no one's required
10 to adopt a religious position at Seattle University. But we treat people as having a
11 religious dimension.

12 *Tr. 88:15-25; 89:1-2.*

13 Jesuit colleges and universities, including Seattle University, believe in the transforming
14 power of the education of students as whole persons and the inculcation of Catholic and Jesuit
15 values such that students become the kind of persons who are leaders, manifesting these values
16 in whatever they do. *ER Ex. 4; Tr. 57:7-11.*

17 The Mission Statement reads: "Seattle University is dedicated to educating the whole
18 person, to professional formation, and to empowering leaders for a just and humane world." *ER*
19 *Ex. 6.* The University has also adopted the following Vision Statement: "We will be the premier
20 independent university of the Northwest in academic quality, Jesuit Catholic inspiration, and
21 service to society." *Id.* The University's Values reflect its Catholic Jesuit character in the areas
22 of Care, Academic Excellence, Diversity, Faith, Justice and Leadership. Under "Faith," the
23 Values Statement reads: "We treasure our Jesuit Catholic ethos and the enrichment from many
24 faiths of our university community." The University's Mission, Vision, and Values Statements
are on display in many campus buildings, including residence halls and in classrooms, as well as
on the University's website.⁹ *Tr. 274:19-25.*

The Jesuit approach seeks to allow a person to gain a deeper understanding of the world
around him or herself, a deeper understanding of him or herself, and a deeper understanding of

1 him or herself with God or his or her spiritual religious nature. *Tr. 602:1-11*. This approach
2 encourages students to use that education to affect change in the world and to be of service to
3 others in following the teachings of Jesus Christ with a particular focus for the poor and the
4 disenfranchised. *Tr. 602:15-19*.

5 Religious “litmus” tests of faculty and students are contrary to the way the Jesuits
6 practice their Catholic faith. *Tr. at 86*. In fact, the Jesuit inclusiveness paradigm appeals to
7 individuals of other faiths. “Part of our Catholic identity is to support the faith of any of our
8 students in whatever their religious tradition is, and that’s part of being an inclusively Catholic
9 university. Father Peter Ely, S.J., the University’s Vice President for Mission and Ministry,
10 offered an illustration: “[W]hat characterizes Seattle University is [that] it’s inclusive. And the
11 important thing to me is that being inclusive does not mean being less Catholic. And I think it
12 would be easy for people to read it that way, because ‘inclusive’ seems to mean that you’re open
13 to other things and, therefore, you’re not rigidly or exclusively Catholic.” *Tr. 287:1-8*.

14 The Jesuit approach to Catholicism underscores everything that the University attempts
15 to accomplish as an academic institution. *Tr. 313:16-17*; *See also ER Ex. 16* (diagram describing
16 integrated Jesuit education), *ER Ex. 17* (the University’s “Undergraduate Learning Objectives”
17 that are rooted in Jesuit traditions). Dr. Isiaah Crawford, University Provost, ensures that the
18 courses, certificates, and degree programs offered by the University embody the Jesuit Catholic
19 Charism.¹⁰ *Tr. 312:14-24*. Jesuits emphasize social justice, which, in the Jesuit tradition,
20 translates into a belief that all humans deserve respect and dignity regardless of background,
21 faith, status, or social or political affiliation. *Tr. 1148*. The Jesuit social justice mission
22 “pervades the core curriculum” in terms of its teaching goals and is present in many student
23

24 ⁹ Available at: <https://www.seattleu.edu/about/mission/>.

1 activities centered on social activism. *Tr. 1149*. As a result, the University particularly aims for
2 its students to use their education to engage in actions for the betterment of the world. *Tr.*
3 *313:10-16*. For example, the School of Theology and Ministry provides educational
4 programming for those looking to go into pastoral work. *Tr. 316:18-24*. It has an ecumenical
5 focus, offering programs in pastoral studies, a Master's Degree in Divinity, and a program in
6 transformational leadership. It provides a professional education for those seeking to perform
7 professional ministerial work. Another example of how the Catholic and Jesuit character of the
8 University influences educational offerings can be found in the nursing program. The University
9 does not allow its nursing students to engage in training or study on procedures that involve the
10 termination of human life. *Tr. 672:7-9; 685*.

11 The University encourages its faculty to develop a deep knowledge and appreciation for
12 the Jesuit paradigm. *Tr. 601*. Its *2009-2014 Academic Strategic Action Plan* contains a
13 "Comprehensive Faculty Development" section that describes opportunities for spiritual
14 development training and learning experiences concerning Jesuit pedagogy and the Ignatian
15 Paradigm. *ER Ex. 29; Tr. 601*. The University expects that Catholic social teaching informs the
16 faculty's thoughts and interests relating to their scholarship and looks for faculty to incorporate
17 Catholic social teaching as they deem appropriate within their coursework. *Tr. 601*. Mission
18 and related topics are also covered in their interviews and upon hire. For example, President
19 Sundborg, in a 2012 address for all new faculty hires, spoke about fulfilling the University's
20 mission by engaging in a spiritual sense. *Tr. 1136; See also ER Ex. 72* (New Faculty Institute
21 2013 materials showing "Jesuit Reception," "Jesuit Dinner," and a session on "The Jesuit
22 Tradition and Teaching" on the agenda). Indeed, the Faculty Handbook states that:

23
24 ¹⁰ Merriam-Webster's Online Dictionary defines Charism as "an extraordinary power (as of healing) given a
Christian by the Holy Spirit for the good of the church." (<http://www.merriam-webster.com/dictionary/charism>).

1 Recognition of the religious dimension of human life is fundamental to the identity of a
2 Jesuit university. For Seattle University to achieve its mission and to maintain its
3 identity, its faculty must be a community of scholarly persons with an acknowledgment
4 of or a respect for its Catholic religious and cultural tradition. Each member of the
5 faculty is expected to show a respect for the religious dimension of human life...*Given
the Jesuit tradition and educational philosophy of Seattle University, the ability to
contribute actively in a variety of ways to the Jesuit ethos of the University's educational
work is a quality which the University seeks in prospective faculty members and
recognizes in all faculty as a significant asset."*

6 *ER Ex. 3, Section 3.1(b) and (c) (emphasis added).*

7 The University's Jesuit mission seeks out faculty without regard to their religious
8 affiliation and encourages faculty to respect one another's beliefs, whatever they may be. *Tr.*
9 *85:8-24; ER Ex. 3, Section 10.2.* There is an expectation, however, that faculty do not
10 misrepresent or provide a false depiction of Catholic doctrine or dogma. As Father Sundborg
11 states: "We simply expect that [faculty] respect our Catholic character...that they don't present
12 as Catholic what is not Catholic and they do not misrepresent what the Catholic church teaches."
13 *Tr. 90:8-13; See also ER Ex. 3, at 34* (describing requirement of respect for Catholic religious
14 and cultural traditions and beliefs).

15 Core Jesuit values are also promoted through the University's policy that allows faculty
16 and staff to take time off, with pay, to participate in community service activities. *Tr. 604:14-18.*

17 At the heart of the University's undergraduate program is its Core Curriculum. *Tr.*
18 *765:22* (*It is "the center of gravity of a Seattle University education"*). Approximately 95% of
19 undergraduates go through the Core. *Tr. 766:3.* The Core has been taught at the University
20 since its inception. *Tr. 766:23-24.* The Core involves twelve courses spread out across three
21 different modules, plus a module in a student's major. All students must take two philosophy
22 courses and one Catholic theology course. A second theology course includes comparative
23 religious studies with Catholicism as the baseline. *Tr. 767:14-23; ER Ex. 39.*

Of the 700-800 courses taught in the Core each academic year, approximately 55% of its instructors are in the petitioned-for bargaining unit. *Tr. 805-818.*

The *University Core Curriculum Learning Objectives* describe the nature of the Core, and how that nature informs the curriculum.

Rooted in Jesuit, Catholic educational traditions, the primary aim of Seattle University's Core Curriculum is formative and transformative liberal education. The key elements of this curriculum are foundational knowledge in several relevant disciplines, critical inquiry, reflection on learning and values, and preparation for life as an effective and ethical global citizen.

ER Ex. 37.

The Core's learning objectives are derived from the University's undergraduate learning objectives, and shaped by four broad goals, each of which has specific knowledge, skills and values associated with it. The first of these goals is rooted in "Jesuit Catholic Intellectual Traditions:"

Through knowledge of Jesuit, Catholic intellectual traditions and understanding of diverse religious traditions, students will reflect on questions of meaning, spirituality, ethics, values, and justice.

Knowledge:

- Understand academic traditions (theological, philosophical, etc.) on which Jesuit education is based
- Understand Catholic theology
- Understand Jesuit, Catholic perspectives within the context of world religions.

Skills:

- Ability to articulate one's own spiritual/religious perspective
- Ability to appreciate and reflect on religious and spiritual perspectives other than one's own

Values:

- Respect for religious diversity

ER Ex. 37.

The University's Core is a tightly integrated core reflective of the University's Catholic Jesuit character. An integrated, "core" curriculum has been part of the Jesuit educational

1 tradition since at least 1599, with the publication of the *Ratio Studiorum*,¹¹ which was the initial
2 Jesuit handbook for how to run a curriculum in a school. *Tr.* 770:4-8. It is “a transformational
3 core; it’s trying to create certain skills, values, sensibilities, world views” that form students in
4 ways consistent with the Jesuit mission. It aspires to develop certain kinds of capabilities,
5 knowledge, skills and values to help prepare students to be a certain kind of person in the world.
6 *Tr.* 771-772. Dr. Jeff Philpott, who directs the Core, contrasted this with other models found at
7 most colleges and universities, where “[y]ou take a little bit of this and a little bit of that and a
8 little bit of other things” in a series of one-off courses. *Tr.* 770:17-23.

9 There is a strong emphasis on Theology and Philosophy, both central elements of Jesuit
10 education for 450 years. *Tr.* 771:10-16. All students must take a theology course that studies the
11 Catholic Jesuit tradition. *Tr.* 784:3-8; *ER Ex.* 38 (*UCOR 2100 Course Description*). “Religion
12 in a Global Context,” studies a non-Catholic or at least non-Western Catholic religious tradition
13 and tries to put it into dialogue with Catholic tradition in some way. *Tr.* 784:20-22; *ER Ex.* 38
14 (*UCOR 3100 Course Description*). The Philosophy requirement continues 450 years of Jesuit
15 education tradition and is designed to promote “philosophical reflection” and the Jesuit belief
16 that God is in all things and the individual’s personal responsibilities to, and relationship with,
17 others. *Tr.* 787:14-25, 788:1-5.

18 In April 2008 Father Sundborg delivered a speech at the Provost’s Convocation dedicated
19 to defining the University’s distinct Catholic and Jesuit character. *Employer Ex.* 71. In one
20 segment, the speech delineated the essence of the University as “Catholic” and “Jesuit:”

21 The Catholic Church has an official understanding, set of guidelines and norms for being
22 a Catholic university. We need to know and respect them. So important are Catholic
23 universities to the Catholic Church that the title of the official document about them is

24 ¹¹ This is an abbreviated title for “*Ratio atque Institutio Studiorum Societatis Jesu*,” i.e., “Method and System of the
Studies of the Society of Jesus.” *The Catholic Encyclopedia*, available at <http://www.newadvent.org/cathen/12654a.htm>.

1 “From the Heart of the Church.”¹² We are not the Church, we are not a church, but we
2 are a university from the heart of the Catholic Church. It matters to the Catholic Church
3 that we are a university, and it matters to us as a university that we are Catholic. This is
4 part of the pursuit of our truth as an institution that we as academic colleagues need to
5 explore and can explore freely with our commitment not only to truth in general but also
6 to our own truth.

7 *Employer Ex. 71, The Catholic Character of Seattle University’s Academic Mission: Convening*
8 *a Conversation*, April 11, 2008, also available to faculty, students and the public at
9 <https://www.seattleu.edu/president/speeches>.

10 The University’s Catholic and Jesuit inspiration pervade the University’s curriculum, its
11 view of the teacher vocation within that curriculum, and the formation of the “whole person” by
12 means of the Jesuit educational mission. The Regional Director ignored the above-noted
13 evidence in concluding that the University’s faculty members have no specific religious function.
14 The religious function of the faculty is to teach at a Catholic and Jesuit university, a critical role
15 without which the University would not exist. Catholic and Jesuit tenets consider the vocation of
16 teaching to be sacred and to have a religious aspect which the Regional Director overlooks.
17 University faculty members in the petitioned-for unit teach in the Core, which is based on the
18 Jesuit religious tenet of formation of the whole person. To substitute his version of “religious
19 function” for that of the Catholic faith and the Society of Jesus, thereby concluding that the
20 University’s faculty members in the instant case are not “sufficiently religious,” repeats past
21 errors.

22
23 ¹² *Ex Corde Ecclesiae*, Apostolic Constitution of the Supreme Pontiff John Paul II on Catholic Universities, 15
24 August 1990, available at http://www.vatican.va/holy_father/john_paul_ii/apost_constitutions/documents/hf_jp-ii_apc_15081990_ex-corde-ecclesiae_en.html.

1 **V. THE REGIONAL DIRECTOR’S REFUSAL TO REOPEN THE RECORD**
2 **DEPARTED FROM BOARD PRECEDENT, WAS AN ABUSE OF DISCRETION**
3 **AND DEPRIVED THE UNIVERSITY OF PROCEDURAL DUE PROCESS**

4 The Regional Director concluded that the Board has jurisdiction over the University
5 based on a record created to address the now discarded “substantial religious character” test. The
6 University did not put on any evidence addressing the specific elements of the Board’s new
7 “specific religious function” test because that test did not exist. The Regional Director declined
8 to reopen the record to allow the parties the opportunity to present evidence in response to the
9 Board’s new test. This was prejudicial error.

10 The University did not offer any evidence or testimony addressing specifically the role of
11 faculty members in creating or maintaining the religious mission of the University. A partial
12 record establishes this role (*see* section IV, *supra*), but the University did not have the
13 opportunity to put forth a complete record in this regard. Such evidence would have included
14 testimony from faculty and others regarding the religious function faculty members serve under
15 the University’s religious mission, as well as evidence regarding the Jesuit faculty and faculty of
16 the School of Theology and Ministry under the new Board test. Consequently, the Regional
17 Director should have ordered the record reopened to allow the parties to address this specific test.
18 *Comm. Transit Svcs., Inc.*, 290 NLRB 1167 (1988) (Record reopened on remand to consider
19 evidence under new Board standard). Courts have found a failure to reopen the record following
20 a new agency standard to be an abuse of discretion. *Welch v. Comm’r of Internal Revenue*, 208
21 F.3d 213 (6th Cir. 2000). A full and fair opportunity to litigate a matter includes the right of the
22 parties to know what issues to address. The Regional Director’s failure in this regard deprived
23 the parties of procedural due process. *Factor Sales, Inc.*, 347 NLRB 747 (2006).

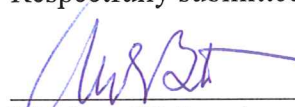
1 CONCLUSION

2 For these reasons, the University requests the Board to accept review of the Regional
3 Director's Order. The *Pacific Lutheran University* test contains the same constitutional
4 infirmities as the test it replaces. The Board should adhere to the D.C. Circuit's "bright line" test
5 under *University of Great Falls* and *Carroll College* and dismiss the petition for lack of Board
6 jurisdiction. Furthermore, the Regional Director disregarded evidence establishing the religious
7 mission of the University, and the faculty's role in creating and maintaining that mission. The
8 record upon which the Regional Director asserted jurisdiction was developed under the Board's
9 former test. The Regional Director should have allowed the parties to submit evidence and
10 testimony addressing the "specific religious function" prong of the Board's new test. His failure
11 to do so departed from Board precedent, was an abuse of discretion, and violated the parties' due
12 process rights.

13 Dated this 17th day of March 2015.

14 Respectfully submitted,

15 



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